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91-762

NO. 91-____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUGHES ANDERSON BAGLEY, JR.,

Petitioner

v.

CMC REAL ESTATE CORPORATION aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; and, NORMAN W. PRINS,

Respondents.

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QUESTIONS PRESENTED

I

Whether the Court of Appeals' opinion is in conflict with precedent from this court governing the point at which a claim accrues?

II

Whether the Court of Appeals' opinion is in conflict with the opinions of those federal courts which have squarely addressed the issue of whether a civil rights claim based on an unconstitutional conviction accrues at the time the plaintiff first learns of the underlying facts or on the date of reversal?

III

Whether, in finding that Petitioner was not collaterally estopped from success fully prosecuting his civil rights claim until his criminal conviction was reversed, the Court of Appeals incorrectly found that the issue of whether Bagley's criminal conviction was unconstitutional was different from the issue of whether the individual Respondents had violated his constitutional rights?

IV

Whether the Court of Appeals' opinion fails to strike the proper balance between the competing concerns embodied in statutes of limitations, the doctrine of collateral estoppel, the goal of judicial economy, and the federal interest in permitting prosecution of meritorious civil rights claims?

PARTIES TO THIS ACTION

The only parties to this action are those named in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURTS OF APPEALS CASES

DISTRICT COURT CASES

STATE COURT DECISIONS

STATUTES

RULES OF COURT

In the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Hughes Anderson Bagley, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Bagley v. CMC Real Estate, et al*, 923 F.2d 758 (9th Cir. 1991.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-12a) is reported at 923 F.2d 758 (9th Cir. 1991). The Order of the district court (App., *infra*, 13a-14a) adopting a Magistrate's Report & Recommendation (App., *infra*, 15a-31a) was not reported.

JURISDICTION

The Order of the Court of Appeals denying rehearing was entered on June 3, 1991 (App., *infra*, 32a-33a). This petition has been filed within the time allowed by an extension granted pursuant to Rule 20.1 by Justice O'Connor on September 4, 1991. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

JURISDICTION BELOW

The district court's jurisdiction was founded in Title 28 U.S.C. Section 1331. The Court of Appeals' jurisdiction was founded in Title 28 U.S.C. Section 1291.

STATEMENT

1.) In August, 1988, Bagley filed this action pursuant to the United States Constitution, a "*Bivens*" action, and Title 42 U.S.C. Sections 1983 and 1985. Bagley alleged that Respondents Prins and Mitchell and James P. O'Connor, a defendant who is not a party to this action because he could not be located and was never served, violated Bagley's federally protected rights while acting in their respective capacities of federal and state law enforcement officers. Bagley also alleged that, as successors to the Chicago, St. Paul and Milwaukee Railroad, Respondents Soo Line and CMC Real Estate were also liable because of the Milwaukee Road's failure to properly train and supervise Mitchell and O'Connor.

2.) To summarize the Complaint, Bagley alleged that in April, 1977, while acting as a federal law enforcement officer, Respondent Prins solicited the services of Respondent Mitchell and O'Connor, both of whom were state commissioned law enforcement officers, in an

investigation of Bagley and that Respondent Mitchell and O'Connor agreed to Prins' request for assistance. Bagley further alleged that Respondent Mitchell and O'Connor, with the knowledge and assistance of Respondent Prins, made false sworn statements for the purpose of concealing the fact that Mitchell and O'Connor were being paid for their assistance and that as a result of those false statements, Bagley's federally protected rights were violated and he was wrongfully convicted and imprisoned.

3.) Mitchell and O'Connor made their false sworn statements in May, 1977. Bagley was tried and wrongfully convicted as a result of those false statements in December, 1977. Bagley first learned that the statements denying payment were false in May, 1980. Bagley's 1977 conviction was reversed for the first time in October, 1983, and, after remand by this Court, was reversed again in September, 1986. 1/

4.) This action was filed on August 18, 1988, less than two years after the Court of Appeals finally reversed

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1/ The facts supporting Petitioner's claim for damages and the relevant time frames are well documented in the published opinions of this Court and the United States Court of Appeals for the Ninth Circuit. The 1977 conviction which resulted from the concealment of the fact that Respondent Prins had secretly paid Respondent Mitchell and O'Connor was first addressed by the Ninth Circuit in *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983). The government obtained *certiorari* and the case was remanded back to the Ninth Circuit by this Court for reconsideration. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985). On remand, the Ninth Circuit reversed the 1977 conviction again in *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). For purposes of this Petition, the critical date is September 2, 1986, the date of the decision in *Bagley v. Lumpkin*, 798 F.2d 1297.

the unconstitutional 1977 conviction.

5.) There is no dispute as to the historical facts. As agreed by the parties throughout the proceedings below, and as found in the Court of Appeals' opinion, (App., *infra,* 1a-12a, and documented in the opinions cited in footnote 1 to this brief, the relevant facts are as follows.

a.) In May, 1977, Respondent Mitchell and O'Connor entered into written agreements with the Bureau of Alcohol, Tobacco and Firearms (BATF) whereby they would be paid for their services as informants against Bagley. Mitchell and O'Connor also executed false sworn statements denying that they would be paid for such services.

b.) In the Fall of 1977, prior to Bagley's criminal trial in the United States District Court for the Western District of Washington, case number CR77-330V, Bagley's defense counsel asked the government for information as to any rewards or inducements given to Mitchell and O'Connor for their testimony against Bagley. The Assistant United States Attorney in charge of the case, who had not been advised of the written contracts calling for Mitchell and O'Connor to be paid, responded by producing copies of the sworn statements which falsely denied any expectation of payment. Bagley was convicted at trial.

c.) In May, 1980, Bagley learned through the Freedom of Information and Privacy Acts, 5 U.S.C. sections 552 and 552a, that Mitchell and O'Connor had in fact been paid for their testimony at trial and had signed contracts providing for such payments several months prior to trial.

d.) After more than six years in the courts, Bagley's

1977 criminal conviction was reversed for the second and final time on September 2, 1986.

e.) This action was filed on August 18, 1988.

6.) The Respondents moved for judgment on the pleadings on the theory that the statute of limitations had run prior to the action being filed because Bagley's cause of action accrued and the statute of limitations began to run in 1980 when Bagley first learned that Mitchell and O'Connor had been paid and that their statements denying any expectation of payment were false. Bagley resisted judgment on the pleadings, contending that his cause of action did not accrue until September 2, 1986 when his conviction was finally reversed because until then he had no discernible, quantifiable injury and because he would have been collaterally estopped from alleging that his 1977 conviction was unconstitutional until the conviction was finally reversed.

7.) The Magistrate filed a Report and Recommendation (App., *infra*, 15a-31a) which found that the statute of limitations had run because Bagley's claim accrued in 1980 when he first learned that Mitchell and O'Connor had in fact been paid for their testimony. The Report and Recommendation also concluded that in order to allege a conspiracy to violate federally protected rights under Title 42 U.S.C. Section 1985(2), a plaintiff must demonstrate that he is a member of a protected class, a finding not challenged here.

8.) The District Court adopted the Report and Recommendation in its entirety by reference in its Order (App., *infra*, 13a-14a).

9.) On Appeal, the United States Court of Appeals for

the Ninth Circuit affirmed. In an opinion published at 923 F.2d 758 (App., *infra*, a-12a), the Court of Appeals found that while:

> Bagley argues that because he had no cognizable, compensable injury until his unconstitutional 1977 conviction was finally reversed in 1986, his cause of action did not accrue until that time. *There is some appeal to this argument. Nevertheless, precedent compels us to reject this theory.* (Emphasis added.)

App., *infra*, 5a. The Court of Appeals went on to hold that:

> Other circuits, as well as our own have *implicitly* held that habeas corpus proceedings do not delay accrual of Section 1983 claims. (Emphasis added.)

App., *infra*, 7a. The panel then held that Bagley's cause of action:

> . . . accrued for statute of limitations purposes when he first learned of the injury giving rise to his claims, and not at the completion of his habeas corpus proceeding.

App., *infra*, 8a.

Citing *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), the Court of Appeals found that its conclusion that Bagley's claim had accrued when he first learned the underlying facts in 1980, rather than when his conviction was finally reversed in 1986, was consistent with the policy that statutes of limitations represent a legislative judgment that it is unjust to fail to

put an adversary on notice within a specified time limit. It found this to be so because during the period between 1980 and 1988, none of the defendants had known that Bagley contemplated bringing an action against them and could take no steps to preserve evidence, a fact which it found was likely to be prejudicial. While finding that it was "not without appeal", the Court of Appeals rejected Bagley's argument that it was in the interests of judicial economy to hold that civil rights actions of the type in issue here did not accrue unless and until the conviction was reversed because it found the price of delay too high and felt that the judiciary could conserve resources by simply staying civil rights cases of this type until the habeas proceedings have been completed. The Court of Appeals also expressed a concern that Bagley's approach would extend statute of limitations indefinitely because there are no limitations on habeas corpus. App., *infra,* 8a-9a.

Finally, the Court of Appeals found that Bagley would not have been collaterally estopped from asserting his claim prior to the reversal of his conviction because the issues presented in this case and in his Section 2255 motion were different, and noted that in any case he could have filed this action and then asked the District Court to stay the case pending the outcome of the Section 2255 motion. App., *infra,* 9a-10a.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH PRECEDENT FROM THIS COURT GOVERNING THE POINT AT WHICH A CLAIM ACCRUES.

A. The Requirement For A Discernible, Quantifiable Injury

While finding that it had "some appeal", App., *infra*, 5a, 8a, the Court of Appeals rejected Petitioner's contention that his civil rights claim did not accrue until his unconstitutional conviction was reversed on collateral attack because he had no cognizable, quantifiable injury until that time. Instead, the Court of Appeals held that the claim accrued when Bagley first learned that Mitchell's and O'Connor's statements denying that they would be paid for their testimony were false.

While this Court has never squarely addressed the issue of whether a civil rights claim based on an unconstitutionally obtained criminal conviction can or does accrue before the conviction is vacated, the Court of Appeals' ruling conflicts with prior decisions of this Court in several ways.

In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court found that even though a land owner's use of property was restricted for several years, a claim for taking without just compensation had not yet accrued for purposes of a Section 1983 action because there had not been a final decision by the local Planning Commission as to whether to apply certain regulations in such a way as to limit the owner's use of the property, a position analogous to the one Petitioner himself in until his conviction was finally reversed. In *Williamson County Planning Commission,* this Court reasoned that the claim for uncompensated taking was not yet ripe for adjudication because, *inter alia,* until a final decision was rendered by the Planning Commission, the plaintiff could not establish that there had been a taking at all. In addition, the Court found that, even assuming that there had been a taking, until there was a

final decision by the Planning Commission, it was not possible to quantify the extent of the land owner's damage. 473 U.S., at 186-194, 105 S.Ct., at 3116-3120. Significantly, in *Williamson County,* this Court did not require, as did the Court of Appeals in Petitioner's case, that one who has knowledge of facts which may, *or may not,* prove an injury at some time in the future put the putative defendant on notice by filing his action and then having it stayed pending a final determination as to the existence and extent of the possible injury.

B. De Minimus Injury As A Cause Of Accrual

The Court of Appeals found, App., *infra*, 8a, that Petitioner's claims accrued in 1980 when he learned that Mitchell and O'Connor had in fact been paid for their testimony. The Court of Appeals reasoned that at that point, *even though his conviction had not yet been found unconstitutional*, Petitioner "learned of the *injury* giving rise to his claims". *Id.* The Court of Appeals' finding conflicts with *United v. Kubrick, supra,*, 444 U.S., at 122, 100 S.Ct., at 359, in which this Court held that even when a potential civil plaintiff has knowledge of the facts which may eventually give rise to a cause of action, where there is no discernible injury at the time or the apparent injury is *de minimus,* the plaintiff's claim does not accrue until he learns the extent of his injury. 2/

2/ In the Courts below, Petitioner analogized himself to one who has been "rear ended" in a car accident, but who has sustained no provable damage until much later when a whiplash injury manifests itself. While Respondents belittled this argument in the Courts below and the Court of Appeals did not address it, the analogy is apt. This Court has held in *Wilson v. Garcia,* 471 U.S. 261, 277-279, 105 S.Ct. 1938, 1947-1948 (1985) that Section 1983 actions, and so by analogy, *Bivens* claims, are subject to the statute of limitations for personal injuries in the forum state because such violations are most closely analogous to personal injuries.

C. Harmless Error As A Constitutional Cause Of Action

The Court of Appeals also found, App., *infra*, 5a-6a, that a cause of action such as the one Petitioner alleges, one based on the withholding of arguably exculpatory evidence, accrues either at the time of the withholding or when the criminal defendant learns of the withholding, even though at that time there was still a presumptively valid criminal conviction in place because there had not yet been a finding that the withholding had been material under the standard which this Court enunciated in *United States v. Bagley, supra*, 473 U.S. 667, 105 S.Ct. 3375, 97 L.Ed.2d 481. The Court of Appeals then went on to find, App., *infra*, 9a-10a, that a civil rights Plaintiff would have a cause of action against law enforcement officers such as Prins, Mitchell and O'Connor even if the withholding of evidence was eventually found by a habeas court to have been harmless. This finding is contrary to this Court's holding in *United States v. Bagley, supra*,, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985) that failure to disclose information which is arguably exculpatory rises to the level of a Constitutional violation only if the withholding deprives the defendant of a fair trial. In addition to being in conflict with this Court's opinion in *Bagley*, one end result of the Court of Appeals' ruling is likely to be that, at least until the issue is further litigated, there is likely to be a rash of *Bivens* and Section 1983 actions filed based on the most *de minimus* or even frivolous claims of withheld evidence because, under the Court of Appeals' ruling, a compensable injury can arise even from completely immaterial withholding. 3/

3/ While the Respondents denied in the lower courts that the rule adopted by the Court of Appeals would result in clogging the federal courts with frivolous law suits, Petitioner's prediction that this will result from the Court of Appeals ruling is not [Footnote 3/ continued on page 11]

[Footnote 3/ continued from page 10:] without support. Leaving aside the fact that it would be anomalous to have one standard for reversal of a criminal conviction and a lesser standard for civil liability, the Court of Appeals' ruling will likely create a cottage industry for unscrupulous jailhouse lawyers, many of whom no doubt do quite well from themselves by spawning litigation for which they are paid in one way or another by fellow inmates. A quick check of Shepard's Citations shows that *United States v. Bagley, supra,* has been cited thousands of times since it was announced in 1985. Even allowing for multiple citations in the same case, this means at least hundreds of claims of withheld evidence. While the undersigned does not have current figures available as to the percentage of those claims which are eventually found to be meritorious, at one time about 3% of all Section 2255 Motions were successful. The percentage of successful *Brady / Bagley* claims would probably not differ much from that overall figure. Under the rule announced in this case, even a large percentage of the 97% of applicants alleging *Brady / Bagley* violations whose claims of withholding were found not to warrant reversal because the information withheld was immaterial would be entitled to at least nominal damages. Given the fact that figures supplied by the Administrative Office of the United States Courts show that in 1986, 1987, 1988, 1989 and 1990, respectively, 12,280, 13,046, 13,818, 14,898 and 15,760 post conviction actions attacking federal and state sentences were filed in the United States District Courts and 20,842, 23,716, 24,421, 25,957 and 25,992 prisoner civil rights cases were filed in the United States District Courts, it is reasonable to expect that a large number of civil rights claims will be filed seeking damages for withholding of information which was not sufficiently material to result in reversal of a conviction. As the Attorney General of the State of California said in his *amicus curia* brief in *United States v. Bagley*: "It has been California's experience that the significance of evidence looms larger in loss than in life. (*See, e.g., People v. Harris*, 133 Cal. Rptr. 352, 354.) ... Thus we know of cases where an investigating officer erroneously believed that a witness statement was incorporated in his report, when in fact it was not, ... *People v. Reyes*, 116 Cal. Rptr. 217, 226, or where negatives were overlooked, resulting in [footnote 3/ continued on page 12]

II

THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH THE OPINIONS OF THOSE COURTS WHICH HAVE SQUARELY ADDRESSED THE ISSUE OF WHETHER A CIVIL RIGHTS CLAIM BASED ON AN UNCONSTITUTIONAL CONVICTION ACCRUES AT THE TIME THE PLAINTIFF FIRST LEARNS OF THE UNDERLYING FACTS OR ON THE DATE OF REVERSAL.

There are not many cases which squarely address the issue of whether a claim of the sort in issue here accrues at the time the plaintiff learns the underlying facts or at the time the conviction is reversed because, in recent years, plaintiffs seem to file their civil actions more or less concurrently with their habeas actions and the Courts have then stayed the civil action pending comple-

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[Footnote 3/ continued from page 11:] photographs which were not printed (*People v. Harris*, 139 Cal. Rptr. 784, 788.)" If the Court of Appeals' ruling stands, defendants in criminal cases such as those described by the Attorney General of California will have causes of action which accrue when they learn of the withholding, regardless of whether they suffered actual injury in terms of violation of their Due Process rights. In addition, if the Court of Appeals' ruling stands, caution will require the defendants in such criminal cases to file their civil suits more or less concurrently with their habeas actions. The end result will be a substantial new body of case law on collateral estoppel brought about by large numbers of law enforcement officers defending the civil suits which the Court of Appeals' ruling will generate on the basis of the affirmative defense that the conviction in question was valid, so that the criminal defendant *cum* civil rights plaintiff is therefore collaterally estopped as to any claim of Constitutional violation.

tion of the habeas process. 4/ However, those Courts which have squarely addressed the issue of the point at which a cause of action based on an unconstitutional criminal conviction accrues have held that the cause of action accrues on the date of the last court decision invalidating the conviction.

In *Triplett v. Azordegan*, 478 F. Supp. 872, 875 (N.D. Iowa 1978), the District Court found that until the unconstitutionally obtained conviction which gave rise to the plaintiff's cause of action was reversed, the plaintiff's cause of action did not accrue because, so long as the plaintiff's presumptively valid criminal conviction stood, he could not pursue his claim even though he had known the facts which ultimately established in 1972 that his conviction had been unconstitutionally obtained as early as 1955. The District Court reasoned that unless and until the wrongfully obtained conviction was reversed, the plaintiff's damages could not be defined. It further reasoned that, because the findings in a prior criminal case are preclusive, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 157, 83 S.Ct. 554, 561 (1963), the plaintiff would have been estopped from asserting any claim prior to the reversal of his conviction. 5/

While involving a cause of action against a private party rather than one acting under color of law, the Eighth Circuit's opinion in *McNally v. Pulitzer Co.*, 532

4/ This is precisely what happened in *Young v. Kenny*, 887 F.2d 237 (9th Cir. 1989), the first Ninth Circuit case to squarely hold that such actions should be stayed rather than dismissed pending a decision in the habeas action. *Young v. Kenny* was decided after this case was filed.

5/ While other issues in *Triplett v. Azordegan* were appealed prior to its final resolution, the State did not appeal the issue of the date on which the claim accrued. The case eventually settled.

F.2d 69 (8th Cir. 1976), a case relied on by the District Court in *Triplett v. Azordegan*, reached a similar result to the one Petitioner urges here. In reaching that result, the Eighth Circuit reasoned that the plaintiff was collaterally estopped from alleging a violation of his Constitutional rights by the ruling on appeal in his criminal case conviction that his was valid and there had been no violation of his rights. The Court of Appeals further reasoned that where there had been no Constitutional violation, there was no compensable injury.

Reasoning that a cause of action based on an unconstitutionally obtained conviction did not accrue until the conviction was reversed because the plaintiff would be collaterally estopped from asserting an injury so long as the conviction stood, in *Prince v. Wallace*, 568 F.2d 1176, 1178 (5th Cir. 1978) the Fifth Circuit arrived at a result directly in conflict with the Ninth Circuit's finding in this case.

While not definitively deciding the issue, in *Jones v. Shankland*, 800 F.2d 77 (1986), the Sixth Circuit has also expressed doubt as to whether a cause of action based on an unconstitutionally obtained conviction could accrue before the conviction was reversed on appeal. 6/ In discussing the issue, the Court of Appeals said:

While the language of *Wolff* could be read as

6/ While the Court of Appeals did not address the issue because it concluded that the plaintiff's cause of action was time barred under any theory of accrual, in *Jones v. Shankland*, the District Court found that the plaintiff's cause of action accrued when this Court denied the State's Petition For Writ of Certiorari and the reversal of the plaintiff's conviction, which, incidentally, was overturned for a *Brady / Bagley* violation, became final. *Jones v. Shankland, supra*, 800 F.2d, at 79.

holding that a section 1983 suit for damages may be brought even if the damage claim is dependent upon the constitutionality of the prisoner's confinement, the Supreme Court recently acknowledged that it has not yet determined whether "a Federal District Court should abstain from deciding a section 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state court attacks on the conviction itself." *Tower v. Glover*, 467 U.S. 914, 923, 104 S.Ct. 2820, 2826 81 L.Ed.2d 758 (1984).

.... Our circuit in *Hadley*, concluding that the reasoning of *Preiser* combined with the policy considerations underlying *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), required the district court to stay its hand "where disposition of the damage action would involve a rule implying that a state conviction is or would be illegal," 753 F.2d at 516, and order as specific relief in that case the vacation of the district court's ruling that the plaintiff there had failed to state a claim upon which relief could be granted. At the same time, it affirmed the district court's dismissal of Hadley's claim, *without prejudice, however, to his opportunity to refile his claim under section 1983 if and when he established through a writ of habeas corpus that the was denied a constitutional right. The specific relief accorded in Hadley would normally raise some question whether, therefore, the accrual of a petitioner's cause of action for damages based upon constitutional violations which also affected his liberty, would be suspended during the entire time necessary to pursue the habeas action to a successful conclusion. ... There is support and logic for both views.*

Jones v. Shankland, supra, 800 F. 2d at 82 (emphasis added).

In a closely analogous situation, in *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3rd Cir. 1985), *cert. denied*, 106 S.Ct. 183, the Third Circuit found that in the case of railway workers who had known for years that they had been exposed to asbestos fiber but who manifested no symptoms of their injury, their causes of action did not accrue until their injuries became apparent by their developing asbestoses. The Third Circuit reasoned that the plaintiffs had no cause of action, and thus no "claim" which could accrue, until the plaintiffs were able to demonstrate actual damage sufficient to entitle them to an award of damages. 758 F.2d at 942. The Third Circuit found that, rather than the plaintiffs having to merely have knowledge of certain facts which might, at some future time, conceivably prove a compensable injury, before a cause of action accrued the plaintiffs had to be able to prove a compensable injury. 7/

7/ While undoubtedly decided as a matter of state rather than federal law, on August 14, 1991 the South Dakota Supreme Court held in *Moeller v. State*, Westlaw number 154772, N.W.2d citation not yet assigned as this is written, that a cause of action based on a conviction which was illegally obtained in 1975 did not accrue, and the statute of limitations did not begin to run, until the conviction was vacated on *coram nobis* in 1987. Citing 46 Am.Jur.2d Judgments, Section 28, *Triplett v. Azordegan, supra*, 478 F.Supp. 872 and *Downton v. Vandemark*, 571 F.Supp. 40 (N.D. Ohio 1983), the South Dakota Supreme Court reasoned that, because the plaintiff's claim for damages was premised on the invalidity of his conviction, and because judgments are presumed valid until properly vacated, "the very foundation of [plaintiff's] claim was presumed absent." until the invalid conviction was vacated. The Court found, therefore, that the plaintiff's cause of action did not accrue until the date it had entered an Order vacating the invalid conviction.

III

IN FINDING THAT BAGLEY WAS NOT COLLATERALLY ESTOPPED FROM SUCCESSFULLY PROSECUTING HIS CIVIL RIGHTS CLAIM UNTIL HIS CRIMINAL CONVICTION WAS REVERSED, THE COURT OF APPEALS INCORRECTLY FOUND THAT THE ISSUE OF WHETHER BAGLEY'S CRIMINAL CONVICTION WAS UNCONSTITUTIONAL WAS DIFFERENT FROM THE ISSUE OF WHETHER THE INDIVIDUAL RESPONDENTS HAD VIOLATED HIS CONTITUTIONAL RIGHTS.

In rejecting Bagley's argument that he was collaterally estopped from successfully asserting his civil rights claim until his criminal conviction was reversed, the Court of Appeals held that:

> The issue in this case, however, is different from the issues presented in Bagley's criminal trial [(sic), actually a Section 2255 proceeding]. In the previous trial, Bagley attacked *the constitutionality of his conviction in light of the government's failure to disclose the requested impeachment evidence.* Here, Bagley challenges for the first time the conduct of O'Connor, Mitchell and Prins *as individuals,* on the ground that they violated his constitutional rights. *If these individuals violated Bagley's constitutional rights under color of state or federal law, his civil rights claim would not be totally defeated even if the officer's misconduct was harmless in his criminal trial.*

App., *infra,* 9a-10a (emphasis added).

Thus, the Court of Appeals held that Bagley would

not have been estopped by his later reversed criminal conviction from successfully prosecuting a civil rights action for violation of his Constitutional rights because there is a difference between the issue of whether a criminal defendant has been denied a fair trial by a law enforcement officer's withholding of evidence and the issue of whether the officer is liable for damages for that withholding. In short, as previously pointed out, the Court of Appeals' opinion effectively holds that Bagley would have had a compensable cause of action against Prins, Mitchell and O'Connor even had it ultimately been determined that the evidence withheld was immaterial and that Bagley's criminal conviction was, therefore, Constitutional. In addition to creating a compensable cause of action for what would be, at most, harmless error if it was error at all, the Court of Appeals opinion misapprehends the elements of collateral estoppel.

In *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980), this Court held that collateral estoppel applies to Section 1983 actions, so that by analogy, collateral estoppel would also apply to *Bivens* actions. This Court also held in *Allen v. McCurry*, that for purposes of defensive collateral estoppel, law enforcement officers are in privity with the government and that, because a civil rights plaintiff whose cause of action arises from the facts surrounding an arrest or search or criminal prosecution had sufficient incentive to fully litigate an issue in his criminal trial, the defendant *cum* plaintiff will be collaterally estopped by an adverse ruling in his criminal case on any issue which is essential to his civil rights claim which was previously decided in the criminal case. In *Caldeira v. County of Kauai*, 866 F.2d 1175, 1177-79 (9th Cir. 1989), the Ninth Circuit applied the rule of *Allen v. McCurry, supra*, to Section 1983 actions. In so doing, the Ninth Circuit stated that in civil rights actions preclusive effect would be given to prior

judgments in a criminal case where:

1.) The issue decided in the prior action was identical;

2.) There was a final judgment on the merits; and,

3.) The parties were identical or there was privity between the parties.

In its ruling on Bagley's original Motion To Vacate Sentence pursuant to 28 U.S.C. Section 2255, the District Court held in 1982 that there was no harm to Bagley's right to a fair trial from the withholding of evidence. If the Court assumes that a civil rights plaintiff alleging a cause of action for withheld evidence in his criminal trial must be able to show an actual injury, as it must do in order to avoid the spate of frivolous suits which will otherwise result from the Court of Appeals' ruling that one who alleges a cause of action based on withheld evidence has a compensable injury even in the absence of materiality to his criminal conviction, then it is obvious that the District Court's 1982 finding of harmless error collaterally estopped the Petitioner from successfully asserting a cause of action for withheld information until his conviction was reversed. Therefore, the Court of Appeals' opinion is contrary to the principles of collateral estoppel established in this Court's decision in *Allen v. McCurry, supra.*

IV

THE COURT OF APPEALS' OPINION FAILS TO STRIKE THE PROPER BALANCE BETWEEN THE COMPETING CONCERNS EMBODIED IN STATUTES OF LIMITATIONS, THE DOCTRINE OF COLLATERAL ESTOP-

PEL, THE GOAL OF JUDICIAL ECONOMY, AND THE FEDERAL INTEREST IN PERMIT TING PROSECUTION OF MERITORIOUS CIVIL RIGHTS CLAIMS.

The Court of Appeals' opinion has serious adverse implications for the concerns embodied in a number of different legislative and public policies because the opinion fails to strike the proper balance between those competing concerns. Areas of the law which will be adversely effected by the opinion include the concerns embodied in statutes of limitations, including the related principles of accrual and tolling, the policies underlying the doctrine of collateral estoppel, the goal - or perhaps in this day of ever more crowded dockets, the necessity - of judicial economy, and finally, the federal interest in permitting prosecution of meritorious civil rights claims.

While it is true that statutes of limitations are intended to prevent stale claims, if that rule were absolute, there would be no rules of accrual or discovery and all statutes of limitations would be absolute, so called "statutes of repose". 8/ The fact that the courts and the Congress and Legislatures have developed a rather large and complex body of statutory and case law dealing with accrual and discovery of injuries reflects the value judgment that a balancing of interests is appropriate in this area and that those who were unable to press their claims earlier because they did not know of their injury or were unable to show a compensable injury earlier should not be denied relief simply because their injury was one which could not be detected or proved earlier. If preventing stale claims were the sole consideration in applying

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8/ As Judge Posner explained in *Johnson v. Sullivan,* 922 F.2d 346 (7th Cir. 1990), statutes of limitations are subject to a variety of exceptions, whereas "statutes of repose" are absolute and commence on a "time of the event" basis.

statutes of limitations, there would be no such concepts as "discovery", a concept which the Respondents and the Court of Appeals panel which decided this case accepted without question when arguing and deciding respectively, that Bagley's claim accrued in 1980.

As this Court has stated in *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980), citing *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975):

> "Any period of limitations . . . is understood fully *only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations in necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale ones.* In virtually all statutes of limitations the chronological length of the limitation is interrelated with provisions regarding tolling, revival and questions of application."

Tomanio, supra, 446 U.S., at 485, 100 S.C., at 1795 (emphasis added). Thus, had Petitioner been continuously incarcerated from the time he first learned of the facts underlying this claim in 1980 until his unconstitutional conviction was finally reversed in 1986, it is undisputable that under the rule of this Court's decision in *Hardin v. Straub*,___ U.S. ___, 109 S.Ct. 1998, ___ L.Ed.2d ___ (1989), the provisions of RCW 4.16.110, which tolls statutes of limitations for the imprisoned, would have been applicable to this action and the statute of limitations would not have begun to run on Petitioner's claim until he was released from jail. It is, therefore, clear

that considerations other than notice to potential defendants weigh heavily in the equation which was before the Court of Appeals in this case. This is so because, as this Court went on to explain in *Tomanio, supra:*

> . . most courts and legislatures have recognized that *there are factual circumstances which justify an exception to these strong policies of repose. []*

Tomanio, supra, 446 U.S. at 487-488, 100 S.Ct. at 1797.

In addition to the policy considerations inherent in the statute of limitations, including the many exceptions the policies of repose discussed above, another policy consideration in the equation before the Court of Appeals in this case was the doctrine of collateral estoppel. As this Court explained in *Allen v. McCurry, supra*, 449 U.S. 90, 94, 101 S.Ct.411, 415, 66 L.Ed.2d 308 (1980):

> "Collateral estoppel *relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions*, encourages reliance on adjudication. [authority]."

In short, the doctrine of collateral estoppel is quite similar in at least one respect to the doctrine of immunity. It encompasses the right not only to be free from liability in cases to which it is applicable, but also the right to be free from the burden and expense of litigation itself. If the Court of Appeals' opinion stands, then two purposes of collateral estoppel will essentially be defeated in cases such as this one where a presumptively valid conviction which disposed of a claim of Constitutional violation is still in place. If prospective civil rights plaintiffs are required to file their actions before completion of direct

appeals or habeas corpus actions attacking criminal convictions, then both the right to be free from litigation and judicial economy will be defeated. While the Court of Appeals' opinion was undoubtedly intended to benefit the class of defendants, primarily law enforcement officers, to which *McCurry v. Allen, supra,* accorded collateral estoppel on the basis of a criminal conviction, it will in fact have the opposite effect for the vast majority of law enforcement officers because they will, in many cases, no longer be protected from liability, or even from suit, by the presumptive validity of the convictions on which they could once rely. 9/

Another policy consideration which was involved in the equation before the Court of Appeals in this case is that of the federal interest in permitting litigation of meritorious civil rights claims. As this Court explained in *Hardin v. Straub, supra,* ___ U.S., at ___, 109 S.Ct., at 2002, note 10, there is a strong federal interest in

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9/ The Court of Appeals' concern that Petitioner's theory of accrual will effectively abrogate statutes of limitations on civil rights claims blinks at reality. In addition to the fact that habeas corpus is subject to laches, it is inconceivable that a prisoner with a meritorious habeas claim would delay pressing that claim, and therefore remain in prison, in order to "sandbag" some future civil rights defendant by letting time pass so that memories will dim and documents will be lost. The concern that, in this case, Respondents CMC and Soo Lines have somehow been prejudiced by the passage of time while Petitioner litigated the habeas corpus issue because they had no knowledge of either the claim or the facts underlying it not only overstates any purported prejudice, it is also states no greater hardship than that experienced by many other defendants who are routinely subjected to claims which do not accrue for several years after the incident in question. The most obvious example which comes to mind is the many asbestos cases which have been held not to accrue until the Plaintiff can show a compensable injury. *See Schweitzer v. Consolidated Rail Corp., supra.*

allowing valid claims to be determined on their merits.

The final factor in the equation before the Court of Appeals in this case is that of judicial economy. In addition the prevention of vexatious or harassing lawsuits, judicial economy is recognized as one of the goals furthered by the doctrine of collateral estoppel. Judicial economy will be seriously damaged by the Court of Appeals' opinion in this case because, as demonstrated in footnote 3, *infra*, the Court of Appeals' opinion in this case not only creates a cause of action in cases in which there has been no actual Constitutional injury, it will permit the filing of many lawsuits which might otherwise never see the light of day because they would not accrue unless the plaintiff succeeded in reversing the criminal conviction which he alleges forms the basis of his cause of action. 10/

When all of the countervailing considerations inher-

10/ While the Court of Appeals suggested that courts can further judicial economy through the simple expedient of staying civil rights cases until any underlying criminal case is disposed of on habeas corpus, that approach will in large measure defeat one of the Court of Appeals' prime rationales for requiring early notice to putative defendants - the gathering of information while memories are fresh and documents are available. If that goal is to be served, then discovery will have to be permitted. It is not likely that Courts will permit discovery by a defendant while denying it to the plaintiff. Given the advantages of the more or less mandatory discovery permitted by the Federal Rules of Civil Procedure to a prisoner who was concurrently litigating a habeas action with the benefit of only the discretionary discovery permitted in habeas actions, it does not take a crystal ball to predict that any reasonably bright jailhouse lawyer would soon learn to concoct a "civil cause of action" to go with his habeas action in order to increase his discovery power. When the inmate's discovery attempts very predictably got out of

[Footnote 10/ continued on page 25]

ent in the competing policies underlying statutes of limitations, the doctrines of collateral estoppel, judicial economy and the federal interest in resolving meritorious civil rights claims on their merits are taken into consideration, it is obvious that the Court of Appeals accorded far too much weight to the policy of repose found in statutes of limitations and far too little weight to the other factors in the equation before it. Unless corrected by this Court, that error will do much to undermine the policies inherent in the other considerations in the equation, while at the same time failing to in any meaningful way further the policy of repose underlying statutes of limitations.

CONCLUSION

The Court of Appeals' opinion in this case is in conflict with controlling precedent from this Court because it does not take into account the requirements that a plaintiff have a discernible, quantifiable injury before he has a cause of action. Instead, the opinion creates a cause of action in cases where there has been no actual Constitutional injury. The opinion is in conflict with the opinions of other courts which have addressed the issue of when a cause of action based on allegations of an unconstitutional criminal conviction accrues. In addition, the Court of Appeals' opinion does serious injury to the doctrines of collateral estoppel, judicial economy and the federal interest in deciding meritorious civil rights claim on their merits. For all of the above stated reasons, the Court should grant the requested Writ of Certiorari to review the opinion of the Ninth Circuit Court of Appeals.

[Footnote 10/ continued from page 24:] hand, the Court would then find itself faced with motions to compel and the inevitable cross motions for protective orders. Any hope of judicial economy through the doctrine of collateral estoppel will be reduced to wishful thinking.

DATED this 30th day of September, 1991.

Respectfully submitted,

/S/ Martha M. McMinn

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CERTIFICATE OF SERVICE

I hereby certify that I have served two (2) copies of the above and foregoing on counsel for the opposing party by depositing same in the United Stats mail, with postage prepaid, addressed to:

Office of the Solicitor General
U. S. Department of Justice
Washington, D.C. 20530

and:

Mr. James E. Lobsenz
Attorney At Law
2300 Columbia Center
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Seattle, WA 98104

and:

Mr. James C. Fowler
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34th Floor, Rainier Bank Tower
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DATED this 30th day of September, 1991.

/S/ Martha M. McMinn
Martha M. McMinn

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89- 35870
CV-88-1062-WLD

HUGHES ANDERSON BAGLEY, JR.,
Plaintiff-Appellant,

v.

CMC REAL ESTATE CORPORATION aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; NORMAN W. PRINS,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Washington
William L. Dwyer, District Judge, Presiding
Argued and Submitted
August 6, 1990 Seattle, Washington
[Filed January 22, 1991]

Before: THOMAS TANG, DOROTHY W. NELSON and WILLIAM C. CANBY, JR., *Circuit Judges.*
Opinion by Judge Canby
OPINION CANBY, *Circuit Judge:*

Hughes Bagley appeals the district court's order

granting judgment on the pleadings to all defendants in his civil rights action filed pursuant to 42 U.S.C. sections 1983 and 1985 and *Bivens v. Six Unnamed Narcotics Agents*, 403 U.S. 388 (1971). Bagley challenges only the district court's rulings that his section 1983 claim was barred by the statute of limitations and that he failed to state a cause of action under section 1985. We affirm.

BACKGROUND

Defendants James O'Connor and Donald Mitchell were state law enforcement officers also employed as security officers by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company ("Milwaukee Road"). Defendant Norman Prins is an agent for the Bureau of Alcohol, Tobacco and Firearms ("BATF"). Defendants CMC Real Estate Corp. ("CMC") and the Soo Line Railroad ("Soo") are successors in interest to the Milwaukee Road, having been created pursuant to Milwaukee Road's reorganization proceedings.

Between April and June 1977, O'Connor and Mitchell, with the approval of the Milwaukee Road, assisted Prins in an undercover investigation of Bagley. As a result of this investigation, Bagley was indicted on 15 counts of violating federal narcotics and firearms statutes. O'Connor and Mitchell were the government's two principal witnesses. Prior to his trial, Bagley filed a discovery motion requesting that the government disclose the names of all its witnesses and any inducements made to them in exchange for their testimony. In response, the government provided affidavits from O'Connor and Mitchell, each of whom stated that he had neither received nor expected compensation for his services. In fact, however, Prins had informed O'Connor and Mitchell that he would pay them "expense money" in exchange for their investigatory services. Moreover,

O'Connor and Mitchell had entered a written agreement with the BATF pursuant to which they received compensation for their assistance in the investigation.

At trial, O'Connor and Mitchell testified about both the firearms and the narcotics charges. The court found Bagley guilty on the narcotics charges, but not guilty on the firearms charges, and sentenced him to six months in prison and five years probation.

In May 1980, while in prison on other charges, Bagley filed requests for information pursuant to the Freedom of Information Act and the Privacy Act of 1974, 5 U.S.C. sections 552 and 552a. Through this inquiry, he learned that O'Connor and Mitchell had received compensation for their assistance in the investigation. In 1982 [sic - actually 1980] Bagley filed a motion under 28 U.S.C. section 2255 to vacate his narcotics conviction. On appeal of the denial of that motion, we reversed Bagley's conviction, holding that the government's failure to provide the requested information restricted Bagley's right to a fair trial. *Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983). The Supreme Court reversed and remanded the case "for a determination whether there [was] a reasonable probability that, had the inducement offered by the Government to O'Connor and Mitchell been disclosed to the defense, the result of the trial would have been different." *United States v. Bagley*, 473 U.S. 667, 684 (1985). On September 2, 1986, we found that the government's failure to disclose material impeachment evidence undermined confidence in the outcome of the trial and reversed Bagley's 1977 conviction. *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986).

Bagley filed the present action on August 18, 1988. The complaint alleged that Prins, O'Connor and Mitchell conspired to violate Bagley's constitutional rights to due

process and to confront witnesses against him. Bagley sought damages in excess of $100 million for his wrongful conviction and imprisonment, and the deprivations that accompanied that imprisonment.

Mitchell and Prins moved for judgment on the pleadings, asserting that this action is barred by the statute of limitations and that the complaint fails to state a prima facie case under Section 1985. 1/ In addition, Mitchell filed a motion for summary judgment asserting that the *Brady* claim raised in the complaint is inappliicable to him. Magistrate John L. Weinberg issued a Report and Recommendation in which he concluded that judgment on the pleadings should be granted for all defendants. He determined that the statute of limitations on the section 1983 and *Bivens* claims was three years, Wash. Rev. Code section 4.16.080(2); that Bagley's cause of action accrued in May of 1980; that the statute of limitations was tolled until Bagley was released from prison in 1982; that the pendency of Bagley's habeas corpus proceedings did not toll the statute of limitations or delay accrual of Bagley's claims; and that the claims became barred by limitations in 1985. The Magistrate also concluded that Bagley's section 1985 claim should be dismissed because the statute of limitations had expired and because Bagley failed to allege that he is a member of a protected class. Given this recommendation, the Magistrate did not rule on Mitchell's Motion for Summary Judgment. The district court adopted the Magistrate's Report and Recommendation in its entirety and granted all defendants judgment on the pleadings. Bagley now appeals.

STANDARD OF REVIEW

1/ Defendant O'Connor has not yet been served because Bagley has been unable to locate him.

We review *de novo* a judgment on the pleadings. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Judgment on the pleadings is proper when it is clearly established that there are no issues of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* We accept all allegations of fact by the party opposing the motion as true, and construe those allegations in the light most favorable to that party. *Id.*

DISCUSSION

A. Statute of Limitations

42 U.S.C. section 1983 does not contain its own statute of limitations. Consequently, we apply the statute of limitations for an analogous cause of action under Washington state law. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). We have held that the appropriate statute of limitations in a section 1983 action is the three-year limitation of Wash. Rev. Code section 4.16.080(2). *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981). We have also held that this section applies to *Bivens* claims arising in Washington. *See Johnson v. Horne*, 875 F.2d 1415, 1424 (9th Cir. 1989).

The dispute here is whether Bagley's claim accrued in 1980 when he first learned that O'Connor and Mitchell had in fact been promised compensation for their participation in the investigation, or in 1986 when Bagley's conviction was finally put to rest. Bagley argues that because he had no cognizable, compensable injury until his unconstitutional 1977 conviction was finally reversed in 1986, his cause of action did not accrue until that time. There is some appeal to this argument. Nevertheless, precedent compels us to reject this theory.

Federal law determines when a cause of action

accrues and the statute of limitations begins to run for a section 1983 claim. *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). A federal claim accrues when the plaintiff "'knows or has reason to know of the injury which is the basis of the action.'" *Id.* (quoting *Trotter v. International Longshoremen's & Warehousemen's Union*, 704 F.2d 1 141, 143 (9th Cir. 1983)). The Second Circuit, addressing an issue very similar to the one before us here, held that a plaintiff's section 1983 action accrues when he is incarcerated following a deprivation of his constitutional rights at trial. The court further held that the statute of limitations on that action begins to run upon incarceration notwithstanding the pendency of further state court proceedings. The court concluded, therefore, that the civil rights action should be stayed, rather than dismissed, in order to preserve it through the termination of the state court appeal. *See Mack v. Varelas*, 835 F.2d 995, 1000 (2d Cir. 1987). 2/

2/ There is also an analogous case from the Eastern District of Pennsylvania. In *Drum v. Nasuti*, 648 F. Supp. 888 (E.D. Pa. 1986), *affd*, 831 F.2d 286 (3d Cir. 1987), the court dismissed a section 1983 action because the statute of limitations expired during the pendency of the plaintiff's criminal appeals. The plaintiff in *Drum* filed a section 1983 action alleging that the defendants had committed perjury in his trial. The court, using the same standard for determining the accrual date for a cause of action as this court uses, held that the claim accrued at the time of trial when the plaintiff knew that the defendant had committed perjury. Addressing an argument similar to that made by Bagley, the court stated:

> . . . I must reject plaintiff's argument that his claim was not ripe until the Court of Appeals denied his appeal from his criminal contempt conviction .. [T]he last act which Drum complains of causing his injury would have from [defendant's] testimony of the conspiracy he

[Footnote 2/ continued of page 7]

Other circuits, as well as our own, have implicitly held that habeas corpus proceedings do not delay accrual of section 1983 claims. In *Young v. Kenny*, 907 F.2d 874 (9th Cir. 1990), for instance, the plaintiff filed a section 1983 action alleging that Washington state officials had unconstitutionally failed to apply good time credits to his prison sentence. The district court dismissed the complaint, holding that a habeas corpus petition, rather than a civil rights suit, was the appropriate procedure for challenging the length of the prison sentence. We reversed and ordered that the section 1983 action be stayed, not dismissed. until the plaintiff had exhausted his state remedies. We reasoned:

> Dismissal ... could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement. Exhaustion of state remedies is a process that may take years to complete; it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim. Accordingly, district courts in some circuits stay, rather

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[Footnote 2 continued from page 6]: from [defendant's] testimony of the when he "knew" of the conspiracy he claims. It was then that the statute of limitations accrued. *Id.* at 903 (emphasis in original).

The court also rejected an argument that the criminal appeal tolled the statute of limitations:

> Nor can plaintiff argue that the reason he failed to file his section 1983 action was that the same issues were pending in another proceeding. [citations omitted]. Rather, in such a situation the Court would stay the civil rights proceeding until the criminal proceedings had run their course.... Thus, the statute of limitations ... bars plaintiff's claims.

Id. at 903-04

than dismiss section 1983 complaints in this posture. [citations omitted]. This is a wise policy; . . *Id.* at 878. Thus, we necessarily contemplated that the civil rights claim had accrued and the limitations period had begun to run despite the pendency of a habeas corpus action. *See also, Offet v. Solem*, 823 F.2d 1256, 1258 n.2 (8th Cir. 1987); *Spina v. Aaron*, 821 F.2d 1126, 1128-29 (5th Cir. 1987); *Bailey v. Ness*, 733 F.2d 279, 283 (3d Cir. 1984); *Richardson v. Fleming*, 651 F.2d 366, 375 (5th Cir. 1981); *Conner v. Pickett*, 552 F.2d 585, 587 & n.1 (5th Cir. 1977). 3/ Moreover, there appear to be no cases holding that a civil rights claim does not accrue until habeas corpus proceedings have ended.

In view of all of this precedent, we make explicit the implicit ruling of *Young*, and hold that Bagley's section 1983 and *Bivens* actions accrued for statute of limitations purposes when he first learned of the injury giving rise to his claims, and not at the completion of his habeas corpus proceeding.

This holding is consistent with the policy underlying statutes of limitations. "Statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to

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3/ In a different but somewhat analogous context, the Supreme Court held that commencement of agency proceedings under Title VII, 42 U.S.C. sections 2000e, *et seq.*, did not toll the limitations period for a claim brought under 42 U.S.C. section 1981 challenging the same conduct. The Court suggested as a possible solution "that the plaintiff in his section 1981 suit may ask the court to stay proceedings until the administrative efforts at conciliation and voluntary compliance have been completed." *Johnson v. Railway Express Agency*, 421 U.S. 454, 465 (1975).

prosecute them.' " *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (*quoting Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). Bagley knew of his claim eight years before he filed it. During that time, none of the defendants knew that Bagley contemplated bringing a claim against them and neither CMC nor Soo, as successors to the Milwaukee Road, had any knowledge of the facts giving rise to the claim. The defendants could take no steps to preserve evidence; the likelihood of their being prejudiced by the delay is great.

Bagley argues that it will aid judicial economy to forestall the filing of civil rights actions until completion of habeas proceedings; if the petitioner is unsuccessful in habeas, he will not file the civil rights claim. The argument is not without appeal, but the price of delay is too high. The judiciary can economize its resources by staying the civil rights action until habeas proceedings are complete. Moreover, Bagley's approach might extend limitations indefinitely, since habeas petitions are free of limitations.

We conclude, then, that Bagley's civil rights claims accrued in May 1980, when he learned of his injury. The statute was tolled, however, because the claims accrued while he was in prison, *see* Wash. Rev. Code section 4.16.190. but limitations began to run on July 9, 1982 upon his release. Thus, Bagley had until July 9, 1985 to bring this action. 4/ Bagley missed this deadline so his civil rights claims are now time barred.

4/ In 1984, Bagley was again imprisoned upon his conviction in Iowa state court for violating marijuana laws. Under Washington law, Bagley's return to prison did not "retoll" the statute. Once the statute begins to run, no subsequent disability will toll it. *See Pedersen v. Dept. of Transportation*, 43 Wash. App. 413, 422, 717 P.2d 773 (1986).

B. Collateral Estoppel

The district court originally held that the government's failure to disclose that O'Connor and Mitchell had been compensated for their efforts in the investigation was harmless error. Bagley claims that he could not possibly have brought his civil rights action before his conviction was reversed because he was collaterally estopped by this harmless error ruling from claiming that the defendants here had violated his constitutional rights. We disagree. A plaintiff may be estopped from bringing a civil action to challenge an issue which was "distinctly put in issue and directly determined" in a previous criminal action. *Emich Motors Corp v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976). The issue in this case, however, is different from the issues presented in Bagley's criminal trial. In the previous trial, Bagley attacked the constitutionality of his conviction in light of the government's failure to disclose the requested evidence. Here, Bagley challenges for the first time the conduct of O'Connor, Mitchell and Prins as individuals, on the ground that they violated his constitutional rights. If these individuals violated Bagley's constitutional rights under color of state or federal law, his civil rights claim would not be totally defeated even if the officer's misconduct was harmless in his criminal trial. In any event, Bagley could have filed his civil rights action within the limitations period and then asked the district court to stay that action pending the outcome of his habeas petition. Once his conviction was reversed, there could have been no collateral estoppel effect of any kind on his civil rights claims.

C. The Section 1985(2) Claim

Bagley argues further that the district court erred in

rejecting his claim under 42 U.S.C. section 1985(2). One of the bases of the district court's ruling was Bagley's failure to allege the required class-based animus. Bagley recognizes that only members of a protected class can state a claim under section 1985(3). *See Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971). He suggests, however, that the Supreme Court held in *Kush v. Rutledge*, 460 U.S. 719, 724-727 (1983), that a showing of class-based animus is not required to allege a claim under section 1985(2). This reliance on Kush is misplaced.

Section 1985(2) has two separate parts. 5/ *See*

5/ Section 1985 provides, in relevant part:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
[and]

. . .

(3) . . . do . . . any act in furtherance of the object of
[Footnote 5/ continued on page 12]

Kush, 460 U.S. at 724-25. The first part of the subsection addresses conspiracies "which deter by force, intimidation, or threat a party or witness in federal court." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1233 (7th Cir. 1984). The second part of the subsection creates a federal right of action for damages against conspiracies which obstruct the due course of justice in any State or Territory with intent to deny equal protection. *See Id.* It is clear from the complaint that Bagley is asserting a cause of action for conspiracy pursuant to the second part of section 1985(2). 6/ The Court in *Kush* held only that the first part of section 1985(2) does not require a showing of class-based animus. 460 U.S. at 726. It did not address whether the second part of 1985(2) requires such a showing. We have held, however, that "[a] cognizable claim under [the second part of section 1985(2)] requires an allegation of a class-based, invidiously discriminatory animus." *Phillips v. Bridgeworkers Local 118*, 556 F.2d

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[Footnote 5/ continued from page 11]:

> such such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

6/ Paragraph 61 of the complaint states:

> The conspiracy to violate Plaintiff's Constitutional rights to Due Process and Confrontation of witnesses guaranteed by the Fifth And Sixth Amendments to the United States Constitution . . . is actionable as a violation of Title 42 U.S.C. section 1985, *which prohibits two or more persons from conspiring to hinder or obstruct or defeat the due course of justice with intent to deny any citizen equal protection of the laws.* (emphasis added).

939, 940-41 (9th Cir. 1977); *see also Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1355 (9th Cir. 1981).

Bagley failed to assert his membership in a protected class or any denial of equal protection. The district court properly rejected Bagley's section 1985 claim. 7/

AFFIRMED.

7/ The district court also reasoned that its ruling on this issue was proper because the second part of section 1985(2) applies only to actions in state court and because the claim was barred under the statute of limitations. Because of our disposition of this issue, we need not address these points here.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C88-1062WD

HUGHES ANDERSON BAGLEY,
Plaintiff,

v.

NORMAN PRINS, et al.,
Defendants.

ORDER GRANTING JUDGMENT ON THE PLEADINGS TO ALL DEFENDANTS
[filed November 1, 1989]

The court, having reviewed the complaint filed pursuant to 42 U.S.C. sections 1983 and 1985 and *Bivens v. Six Unnamed Narcotics Agents*, the motions for judgment on the pleadings by defendants Prins and Mitchell, the responses of the plaintiff, the supplemental filings of the parties, and the report and recommendation of United States Magistrate John L. Weinberg, does hereby find and ORDER:

(l) The court adopts the report and recommendation;
(2) The court grants judgment on the pleadings with prejudice, as to all defendants:
(3) The stay which was entered as to defendants Soo

Lines and CMC Realty is VACATED, as moot; and

(4) The motions for an extension of deadlines, and for summary judgment, submitted by defendant Mitchell, are STRICKEN, as moot; and

(5) The Clerk is directed to send copies of this order to the plaintiff and to counsel for all defendants.

DATED this 1st day of November, 1989.

/s_____
William L. Dwyer
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C88-1062WD

HUGHES ANDERSON BAGLEY, Plaintiff,

v.

NORMAN PRINS, et al.,
Defendants.

REPORT AND RECOMMENDATION
[Filed September 12, 1989]

BACKGROUND

The plaintiff filed this complaint on September 12, 1988 [sic], pursuant to 42 U.S.C. sections 1983 and 1985 and *Bivens v. Six Unnamed Narcotics Agents*, 403 U.S. 388 (1971). The defendants include Norman Prins, an agent with the Federal Bureau of Alcohol, Tobacco and Firearms; James O'Connor and Donald Mitchell, who were employed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Co. at the time of the incidents giving rise to this complaint; and two companies, CMC Real Estate Corporation and Soo Line Railroad, which are the successor corporations to the Chicago, Milwaukee, St. Paul and Pacific Railroad Co.

The gravamen of the complaint is that Prins, O'Connor and Mitchell conspired to violate plaintiff's constitutional rights to due process and confrontation of witnesses. The plaintiff asserts the defendants' actions resulted in plaintiff's arrest and conviction on December 23, 1977 for two felony counts of distribution of a controlled substance. He was sentenced to six months in prison and five years' probation. He was imprisoned from January 20, 1978 until mid-June 1978. He remained on probation until March 30, 1979, when he was arrested for parole violations. In May 1979, he was charged with multiple counts of firearms violations. He was convicted of being a felon in possession and of selling firearms, and he was again imprisoned. He was released on parole on July 9, 1982. In January 1984, Bagley was arrested by Iowa state authorities for violation of marijuana laws, and a federal parole violation warrant was lodged as a detainer. On April 5, 1984, he was indicted in the Northern District of Iowa on federal firearms charges. He was convicted of the Iowa state charges on November 8, 1984. As of August 1988, the plaintiff had again been released; his filings in this case indicate a non-prison address.

On September 30, 1986, the United States Court of Appeals for the Ninth Circuit vacated plaintiff's 1977 conviction for distribution of illegal drugs in *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). The court held that the government's failure to disclose to the defendant that Mitchell and O'Connor had been paid by the Bureau of Alcohol, Tobacco, and Firearms to conduct an investigation of Bagley had deprived Bagley of a fair trial. This decision came as the result of Bagley having filed a 28 U.S.C. section 2255 motion in which he "argued that the government violated his due process rights under *Brady* by failing to produce evidence material to the witnesses' credibility." 798 F.2d at 1299. The court concluded that

"the government's *Brady* error undermines confidence in the outcome of Bagley's trial and requires reversal of his conviction." 798 F.2d at 1302.

Thus, in his section 2255 motion, the plaintiff attacked the government's role in his conviction. In this 42 U.S.C. section 1983 complaint, he attacks the role of the three men who participated in the investigation which led to his 1977 arrest. He asserts that, as a result of the alleged conspiracy among and failure to disclose by these defendants, he suffered deprivation of numerous constitutional rights and other damages in conjunction with his 1977 conviction, in addition to numerous wrongs which allegedly flowed from his subsequent arrests and convictions.

After this complaint was filed, the court granted the motion of defendants CMC and Soo Line for a stay Of proceedings pending determination of their motion for injunctive relief which is pending in the Eastern Division of the United States District Court for the Northern District of Illinois. Docket #17.

Defendants Prins and Mitchell have submitted separate motions for judgment on the pleadings. 1/ For purposes of judicial economy, this report and recommendation will address both motions. The plaintiff has responded to both motions, incorporating his response to defendant Prins' motion into his response to defendant Mitchell's motion. Both motions assert two common grounds: (1) this action is barred by the applicable statute of limitations; (2) the complaint fails to state a prima facie case under section 1985. In addition, Mitchell asserts that the *Brady* claim raised in the complaint is not

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1/ Defendant O'Connor has not yet been served because the plaintiff has been unable to locate him. Therefore, he is not a party to this lawsuit at this time.

applicable to Mitchell. Prins presents three additional arguments: there is no showing of "under color of state law" as required for a section 1983 action; the plaintiff has failed to adequately plead a conspiracy pursuant to section 1985; and Prins is not subject to this suit because he is entitled to qualified immunity.

As discussed below, I recommend that these motions for judgment on the pleadings be granted. The plaintiff's claims are barred by the applicable statute of limitations. Furthermore, the complaint fails to state a cause of action pursuant to 42 U.S.C. section 1985. Because I conclude the defendants are entitled to judgment on these bases, this report and recommendation will not address the remaining issues raised by the defendants.

Because the same considerations apply equally to plaintiffs claims against the two corporate defendants, I recommend entry of judgment in their favor as well, despite the fact that these defendants have not yet filed similar motions.

DISCUSSION

Statute of Limitations

42 U.S.C. 1983 does not establish a statute of limitations or a set of tolling rules applicable to actions brought in federal court for violations of its provisions. Therefore, in considering statute of limitations issues in section 1983 claims, this court must apply the Washington statutes of limitations governing an analogous cause of action. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). The parties agree that the applicable statute of limitations in this section 1983 claim is the 3-year limitation of RCW section 4.16.080(2). *See, Owens*

v. Okure, 57 U.S.L.W. 4065 (1989); *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981). Furthermore, the United States Court of Appeals for the Ninth Circuit recently held that RCW 4.16.080(2) also applies to *Bivens* claims arising in Washington. *Johnson v. Horne*, 875 F.2d 1415, 1424 (9th cir. 1989).

When federal courts "borrow" state limitations provisions, they must also enforce coordinate state tolling rules which are not inconsistent with federal policy. *Tomanio*, 446 U.S. at 484-85; *Hardin v. Straub*, 57 U.S.L.W. 4554 (1989).

However, federal law determines when a cause of action accrues and the statute of limitations begins running for a section 1983 claim. *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). A federal claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Id. (quoting Trotter v. International Longshoremen's and Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983)). The accrual of civil conspiracies in this circuit is determined in accordance with the last overt act doctrine. *Gibson v. U.S.*, 781 F.2d 1334, 1340 (9th Cir. 1986). Under that doctrine, "'[i]njury and damage in a civil conspiracy action flow from the overt acts, not from the mere continuance of a conspiracy.'" *Id. (quoting Kadar Corp. v. Milbury*, 549 F.2d 230, 234 (1st Cir. 1977)).

The defendants assert this cause of action accrued in May of 1980. It was then the plaintiff learned through responses to his Freedom of Information Act request that the sworn statements of defendants Mitchell and O'Connor, made in defendant Prins' presence and disclaiming any reward or expectation of reward by Mitchell and O'Connor for their participation in Prins'

investigation of the plaintiff, were false. *See*, Complaint, paragraph 56; Prins' Motion for Judgment on the Pleadings, at 2; Mitchell's Motion for Judgment on the Pleadings, at 2-4.

The plaintiff responds that his cause of action did not accrue until his 1977 conviction was reversed in September 1986, and thus is not time-barred. The plaintiff reasons that the statute of limitations was tolled, pursuant to the "discovery rule," because he could not have discovered the cause and manifest injury until the courts had rendered a final judgment on his 1977 conviction. As plaintiff states, "[i]n this case, while plaintiff became aware of Defendants' tortious conduct in May, 1980, he had no discernible injury until the Ninth Circuit Court of Appeals finally reversed his 1977 conviction in September, 1986." Plaintiff's Response to Prins' Motion for Judgment on the Pleadings, at 5. Plaintiff further asserts he would have been estopped from bringing these claims while his section 2255 motion was pending. Finally, plaintiff asserts the statute of limitations was tolled because he was in prison at the time the cause of action accrued.

The court should find that the statute of limitations was not tolled because of the pendency of plaintiff's section 2255 motion, that plaintiff was not estopped from bringing his section 1983 claim prior to September 1986, and that the plaintiff's incarceration period tolled the statute of limitations only until he was paroled in July, 1982. The applicable statute of limitations in this case, as to plaintiff's *Bivens*, 42 U.S.C. section 1983 and 42 U.S.C. section 1985 claims is three years. Therefore, the plaintiff's claims are time-barred.

The purpose of statutes of limitations is to provide fairness to defendants while preserving a reasonable

time for a plaintiff to present his claim. *U.S. v. Kubrick*, 444 U.S. 111, 117 (1979); *Davis v. U.S.*, 642 F.2d 328, 330-31 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982). As the *Kubrick* Court stated, at 117, "[Statutes of limitations] represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them." (quoting *Railroad Telegraphers v. Railroad Express Agency*, 321 U.S. 342, 349 (1944)).

In this case, the plaintiff admits that he knew in May 1980 that the individual defendants' sworn statements were false. Thus, although he did not know of the alleged violation at the time of the event (1977), he had full knowledge of the defendants' acts in 1980. In addition, he knew the consequences of the defendants' involvement: that he was investigated, indicted, arrested, tried, convicted and imprisoned based at least to some extent on their participation in his case. Thus, he knew in 1980 that he had sustained harm from the allegedly tortious act. Plaintiff makes no argument that the alleged civil conspiracy occurred later than 1977, or that it was continued past that year.

As the plaintiff points out, he could not know *all* the ramifications of the defendants' actions for some time after 1980, since his 1977 conviction affected his litigation pursuant to 28 U.S.C. section 2255 to vacate, set aside, or correct his conviction and that litigation was not fully resolved until September 1986. Also, plaintiff's asserts that his 1977 conviction affected his sentences for his subsequent conviction in 1979 and his 1986 [sic] parole violation charge. However, if the court adopts plaintiff's approach and analogizes these section 1983 and section 1985 claims to personal injury tort claims, then the general rule regarding accrual of a cause of action is that

a cause of action accrues when an injury or harm manifests itself. *Urie v. Thompson*, 337 U.S. 163 (1969). Even if the plaintiff later discovers that his injuries are more serious than he originally thought, his cause of action nevertheless accrues on the earlier date, when he realized that he had been harmed by a defendant's tortious act. *Hicks v. Hines, Inc. [sic]* , 826 F.2d 1543, 1544 (6th Cir. 1978). Thus, the plaintiff may not overcome a statute of limitations defense by arguing that he couldn't have known in 1980 *all* the harm that would flow from the defendants' acts.

The plaintiff further responds that, because his section 2255 motion was proceeding on appeal until 1986, he would have been estopped from bringing a section 1983 claim prior to September 1986. He cites case law which supports the proposition that a plaintiff may be estopped from bringing a section 1983 claim to challenge an issue which was distinctly put in issue and directly determined *in a preceding criminal action. See, e.g., Triplett v. Azordegan*, 478 F. Supp. 872, 875 (N.D. Iowa 1977) (conviction reversed on direct appeal [sic] based on involuntary confession, and court, considering later section 1983 related claim observed, "[t]he issue of voluntariness was sufficiently raised at the original trial to warrant estoppel until the court reversed the conviction in 1972"). The cases cited by plaintiff are inapposite to the facts here. One of the underlying issues in plaintiff's claim is the fact that he didn't know about the contract among the defendants at the time of his criminal trial, and thus he wasn't able to raise it to challenge the government.

The first time that the defendants' actions were distinctly put in issue in plaintiff's case was during the evidentiary hearing on his civil section 2255 motion. After the hearing, this court found that O'Connor and Mitchell

"did expect to receive from the United States some kind of compensation, over and above their expenses for their assistance though perhaps not for their testimony." *See*, Exhibit "B" to Prins' Motion for Judgment on the Pleadings, paragraph 1. Those findings were entered on May 12, 1982. *Id.* Thus, the basic issue upon which this complaint rests--whether or not there was an agreement for compensation among Prins, O'Connor and Mitchell--was decided favorably to the plaintiff's position, and none of the courts which addressed the plaintiff's section 2255 motion thereafter rejected that finding. *See, Bagley v. Lumpkin*, 719 F.2d 1462 (9th Cir. 1983), *rev'd, United States v. Bagley*, 473 U.S. 667 (1985); *Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). Although the United States Court of Appeals for the Ninth Circuit disagreed with this court's conclusion regarding the materiality of the defendants' agreement, the focus of the inquiry throughout the plaintiff's section 2255 proceedings was on the constitutionality of the prosecutor's actions; the legality or wrongfulness of Prins, O'Connor, and Mitchell's actions was not directly at issue.

Other cases cited by the plaintiff are more narrowly limited in their holdings than he indicates. For example, he cites *Cline v. Brusett*, 661 F.2d 108 (9th Cir. 1982), which held that a claim for malicious prosecution does not accrue until the case has been terminated in favor of the accused. *Cline*, 661 F.2d at 110. The plaintiff's claims are not analogous to a common law malicious prosecution claim. 2/ He does not allege malice on the part of the defendants with regard to their participation in his

---

2/ The elements of malicious prosecution are: (1) the institution or continuation of [criminal] judicial proceedings dant; (3) the termination of such proceedings in plaintiff's favor; (4) malice in instituting the proceedings; (5) want of probable cause for the proceeding; and (6) the suffering of injury or damage as a result of the prosecution or proceeding. Restatement (Second) of Torts section 672 (1977).

conviction; he does not assert want of probable cause for the proceeding; and he does not allege that the content of the defendants' testimony was false in any regard except as to the withholding of information about their compensation for participating in the investigation.

The *Cline* court *did* find that other claims raised by the plaintiff, including a false imprisonment claim and a claim that he had been denied a fair trial because the prosecutor knowingly presented false evidence and perjured testimony to the jury, accrued on the date the plaintiff had been found guilty. As the court explained, "[t]hat is the latest date by which the appellant knew or had reason to know of the injuries which were the bases for those causes of action." *Id.*

Similarly, in *Singleton v. City of New York*, 632 F.2d 185, 193 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), which the plaintiff cites, the court held that a claim for malicious prosecution does not accrue until the state prosecution terminates in the defendant's favor, because at common law the favorable termination was an element the accused had to establish in order to maintain his claim. However, the *Singleton* court dismissed the plaintiff's claims for assault and false arrest, holding that those claims accrued on the date of his arrest and were time-barred.

The plaintiff in *Singleton had also urged the court to find that the statute of limitations was tolled during the pendency of his criminal prosecution. The court refused to do so. The court observed that the applicable state law codified a number of common law tolling rules, but included none for tolling the time of filing during the pendency of a criminal prosecution against the plaintiff.* *Singleton*, 632 F.2d at 191. Also, the court found there was no inconsistency between the state's determination

that "the policy of repose underlying the statute of limitations outweighs any burden upon plaintiff arising from his being required to file a cause of action while he is subject to state prosecution" and the federal policy underlying section 1983. *Id.*

Finally, the plaintiff in *Singleton* raised another argument comparable to plaintiff's position here:

> Singleton contends that it would have been fruitless for him to have commenced his section 1983 action while the criminal prosecution was pending since there was a possibility that the federal district court would dismiss the section 1983 action on the ground that it would be inappropriate for a federal court to adjudicate constitutional issues which are relevant to the disposition of pending state criminal charges. These fears are unfounded. As suggested by the Fifth Circuit, the better course in situations where the district court feels compelled to abstain is to stay, rather than dismiss, the section 1983 action so that the plaintiff is protected from a possible statute of limitations bar to the section 1983 suit. *Conner v. Pickett*, 552 F.2d 585 (5th Cir. 1977) *(per curiam)* (remaining citations omitted).

Singleton, 632 F.2d at 193.

In the same manner, if the plaintiff had timely filed this section 1983 claim, it would have been appropriate for this court to stay that cause of action pending the outcome of his section 2255 motion.

For these reasons, the court should find that plaintiff's assertion that the statute of limitations was tolled during the pendency of his section 2255 motion is not

persuasive. As the court concluded in *Singleton*, 663 F.2d at 191, quoting *Tomanio*, 446 U.S. at 479, "plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their [section 1983] actions within three years."

Plaintiff also asserts the statute of limitations was tolled in his case because he was imprisoned at the time he learned about the individual defendants' agreement. Pursuant to RCW 4.16.110, the statute of limitations is tolled when a prospective plaintiff is imprisoned on a criminal charge or serving a sentence for a term less than life. Tolling occurs only if the person suffers the disability at the time the cause of action accrues. *Pedersen v. Dept. of Transportation*, 43 Wn. App. 413, 422 (1986). Also, under Washington law, once the statute of limitations begins to run, no subsequent disability will interrupt its operation. *Id.*

Based on the above, it is clear that the plaintiff cannot rely upon the statute of limitations having been tolled because of his imprisonment. He was in prison at the time this cause of action accrued, in May of 1980, following his 1979 conviction for being a felon in possession of firearms. However, he was released on parole on July 9, 1982. At that point, the statute of limitations began to run, and it expired during July 1985. This complaint was not filed until August 17, 1988. The fact that plaintiff was incarcerated again after his 1982 parole has no effect upon the running of the statute of limitations.

Therefore, plaintiff's claims regarding tolling because of a disability are also not persuasive. Accordingly, the court should conclude that plaintiff's section 1983 and *Bivens* claims are barred by the three-year statute of limitations of RCW 4.16.080(2), and defendants are

entitled to dismissal of these claims. Also, as is discussed below, the same statute bars plaintiff's section 1985 claims.

Section 1985 Claim

The complaint asserts a cause of action pursuant to 42 U.S.C. section 1985 for conspiracy to violate plaintiff's rights. The plaintiff did not specify in the complaint which subsection of section 1985 he is relying upon in this claim. The defendants premised their motions to dismiss the section 1985 claim upon the plaintiff's alleged failure to state a claim pursuant to section 1985(3). They assert that the plaintiff failed to establish the requisite showing of a conspiracy motivated by racial or otherwise class-based animus. *See, Griffin v. Breckenridge*, 403 U.S. 88, 100-102 (1971).

Plaintiff acknowledges that in order to state a claim under section 1985(3) he must establish membership in a protected class. Memorandum in Response to Prins' Motion for Judgment on the Pleadings, at 14. But he asserts that he is bringing this conspiracy claim under section 1985(2). That sub-section provides:

> Obstructing justice; intimidating party, witness, or jury
>
> (2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit

> juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Plaintiff, citing *Kush v. Rutledge*, 460 U.S. 719 (1983), asserts there is no required showing of membership in a protected class to allege a conspiracy in violation of section 1985(2). The court should find that an action pursuant to section 1985(2) also requires membership in a protected class; and the plaintiff's reliance on *Kush* is misplaced.

The *Kush* Court differentiated between the two portions of section 1985(2). The first part of subsection (2) addresses conspiracies "which deter by force, intimidation, or threat a party or witness in federal court." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1233 7th Cir. 1984). The allegations of the plaintiff's complaint do not state a cause of action under this part of subsection (2). Plaintiff does not suggest that witnesses or parties in his criminal trial were coerced to be absent from the trial or to commit perjury, or that parties or witnesses were threatened with harm for their participation in his trial.

The second part of subsection (2) creates a federal right of action for damages against conspiracies "which obstruct the due course of justice with intent to deny equal protection." *Id.*

Paragraph 61 of the complaint states:

> The conspiracy to violate Plaintiff's Constitutional rights to Due Process and Confrontation of witnesses guaranteed by the Fifth and Sixth Amendments to the United States Constitution ... is actionable as a violation of 42 U.S.C. section 1985, which prohibits two or more persons from conspiring to hinder or obstruct or defeat the due course of justice with *intent to deny any citizen equal Protection of the laws*. (emphasis added)

Although the plaintiff did not enumerate in his complaint or in his response to the motion to dismiss the exact part of section 1985 upon which he relies, the complaint and plaintiff's memorandum in opposition to the defendants' motions for judgment on the pleadings lead to the conclusion that plaintiff is asserting a cause of action for conspiracy pursuant to the second part of 42 U.S.C. section 1985(2). The language he uses in paragraph 61 of the complaint, where he sets forth this cause of action, is taken directly from the second part of section 1985(2).

The court has been unable to find case law which directly addresses the issue of whether the second part of section 1985(2) is applicable to a civil claim of conspiracy to obstruct justice in *federal* court, since the language of the statute refers to "the due course of justice in any State or Territory." 42 U.S.C. section 1985(2). However, even assuming that the plaintiff may rely upon this part of the statute, the complaint also fails to provide any basis for a finding of class-based animus.

Kush held only that there is no required showing of class-based animus on persons seeking to prove a violation of their rights under the *first* clause of section

1985(2). *Kush* 460 U.S. at 726. The same does not appear to be true as to the second clause. In *Griffin v. Breckenridge*, 403 U.S. at 102, the Court held that section 1985(3) applies to purely private conspiracies and explained the limitation on section 1985 actions as they relate to alleged deprivations of equal protection:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. (emphasis in original)

The *Kush* Court expressly declined to extend the *Griffin* language to all the remaining portions of section 1985. However, their primary reason for doing so was that "the textual basis for the 'class-based, invidiously discriminatory animus' requirement simply does not appear in that part [the first part of section 1985(2)] of the statute that applies to this case." *Kush*, 460 U.S. at 726.

The court should find the reasoning of *Kush* and the Court's interpretation of section 1985(3) is equally applicable to the second part of section 1985(2). Because an intent to deny equal protection of the laws - which is the "textual basis" referenced in *Kush* - does appear in the second part of section 1985(2), the plaintiff is required to establish his membership in a protected class in order to state a cause of action pursuant to this clause. There is no basis for the court, even upon a liberal interpretation of the complaint, to find that plaintiff can establish this element of a section 1985(2) or (3) Claim.

In addition, the court should conclude that plaintiff's section 1985 claims are time-barred. Although the court has found no case law expressly applying the Washington three-year statute of limitations of RCW 4.16.080(2) to section 1985 claims, the court should follow the guidelines of *Rose v. Rinaldi*, 654 F.2d at 547, and apply the applicable period of limitations under Washington law. *See, also, Johnson v. Railway Express*, 421 U.S. at 462.

Rose held that RCW 4.16.08(2) applies to section 1983 claims because the "catch-all three-year limitations period 'for any other injury to the person or rights of another' contained in RCW 4.16.080(2) furthers [the interest of the United States in preserving the spirit of section 1983 actions]." *Rose*, 654 F.2d at 547. The alternative statute which the court considered was RCW 4.16.130, which sets a two-year limit for "an action for relief not hereinbefore provided for." *Id.* The *Rose* court concluded RCW 4.16.080(2) was preferable because generally a longer statute will be used where there is uncertainty as to which limitations statute governs. *Id.*

Applying this reasoning to the present case leads to the conclusion that the three-year statute of limitations is applicable to plaintiff's section 1985 claims. For the reasons discussed above with regard to his section 1983 and *Bivens* claims, his section 1985 claims are also time-barred.

CONCLUSION AND RECOMMENDATION

For these reasons, I recommend that the court find this action is time-barred as to all plaintiff's claims, and that, in addition, plaintiff fails to state a cause of action pursuant to 42 U.S.C. section 1985. Accordingly, the complaint should be dismissed as to all the defendants.

The order staying the action as to defendants Soo Line and CMC Realty should be vacated, as moot. Defendant Mitchell's motions to extend the deadline for the filing of dispositive motions and completing discovery, and for summary judgment, should be stricken, as moot.

A proposed order accompanies this report and recommendation.

DATED this 12th day of September, 1989.

/s_____
John Weinberg
United States Magistrate

APPENDIX D

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA NO. 89-35870
DC NO. CV-88-1062WD

HUGHES ANDERSON BAGLEY, JR.,
Plaintiff-Appellant,

vs.

CMC REAL ESTATE CORPORATION, aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; NORMAN W. PRINS,
Defendants-Appellees.

ORDER
[Filed June 3, 1991]

BEFORE: TANG, NELSON AND CANBY, CIRCUIT JUDGES

The panel has voted unanimously to deny the petition for rehearinq and suggestion for rehearing en

banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

/s_____
William C. Canby, Jr.
United States Circuit Judge

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-35870
CT/AG#: CV-88-1062-WLD

HUGHES ANDERSON BAGLEY, JR.
Plaintiff-Appellant

vs.

CMC REAL ESTATE CORPORATION, aka CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD; DONALD E. MITCHELL; NORMAN W. PRINS
Defendants - Appellees

APPEAL FROM the United States District Court for the Western District of Washington (Seattle) .

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

Filed and entered January 22, 1991

ENTERED
ON DOCKET
JUL 2 1991

APPENDIX F

The Hon. William L. Dwyer/ Magistrate John L. Weinberg

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

NO. C88-1062WD

HUGHES ANDERSON BAGLEY, JR.,
Plaintiff,
v.
NORMAN W. PRINS, JAMES P. O'CONNOR, DONALD E. MITCHELL, CMC REAL ESTATE CORP., and THE SOO LINE RAILROAD,
Defendants.

NOTICE OF APPEAL
[Filed November 27, 1989]

Plaintiff **HUGHES ANDERSON BAGLEY, JR.** hereby appeals to the Ninth Circuit Court of Appeals from the Order of the District Court adopting the Magistrate's Report and Recommendation granting judgment on the pleadings with prejudice to all Defendants entered in the

above captioned case on November 1, 1989.

DATED this 25th day of November, 1989.

/s -_____

Hughes Anderson Bagley, Jr.
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